

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

**MARY DAUGHERTY; DANIEL SHUE;
DANIEL WALDEN; WILLIAM JOHNSON;
LORRAINE JOHNSON; AND BRIAN
MCWHIRT,**

Plaintiffs,

vs.

**MICHAEL GARGANO in his capacity as Secretary
of the Family and Social Services Administration;
and PATRICIA CASANOVA, in her capacity as
interim Director of the Office of Medicaid
Policy and Planning, Family and Social Services
Administration of the State of Indiana,**

Defendants.

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) **CAUSE NO. 1:06-cv-0878-SEB-DML**
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**STIPULATION TO ENTER CONSENT DECREE
FOLLOWING NOTICE TO THE CLASS**

This action comes before the Court upon the filing of a complaint pursuant to 42 U.S.C. § 1983 by six (6) Medicaid applicants and recipients on their own behalf and on behalf of two proposed classes of similarly situated Medicaid applicants and recipients. The Plaintiffs' Complaint alleges that the State violates federal law and the constitutional requirements of procedural due process by failing to make a determination of eligibility based on an ascertainable standard. The Plaintiffs' Complaint also alleges that the State fails to maintain the benefits of recipients who are appealing an adverse action in violation of federal law.

The Defendants have generally denied the allegations of the Complaint. On March 31, 2009, the Honorable Sarah Evans Barker ruled on the parties' respective motions for summary judgment. Judge Barker granted judgment in favor of the Defendants on all issues involving Class 1 members (defined herein), except for the claims for Class 1 members whose applications

for enrollment in Medicaid for the Aged, Blind & Disabled (hereinafter "Medicaid") with a spend-down were denied during the time period between the filing of the complaint and Defendants' adoption of its new spend-down enrollment policy on June 16, 2008 (hereafter "Applicant Claimants"). Judge Barker granted judgment in favor of the Plaintiffs on the Applicant Claimants, finding there was no genuine issue of material fact regarding the legality of Defendants' notices and standards that were employed to deny Class 1 members' applications for spend-down enrollment between the date that the Complaint was filed and FSSA's adoption of the June 2008 policy, but relief was not determined.

With respect to Class 2, the Court denied the initial motions for summary judgment as moot. FSSA's system was in flux and the Court was "reluctant to enjoin an ongoing self-corrective process."

On April 20, 2011, the Court issued an order on a second round of summary judgment motions. The Court held that the "relief that Plaintiffs seek with respect to the remaining members of Class 1 is barred by the Eleventh Amendment and, accordingly, no genuine issue of material fact related to Class 1 remains for determination at trial."

The Court specifically identified the remaining Class 2 issues for trial: (1) the adequacy of the appeal notifications sent to Class 2 members as pertaining to their right to appeal and to the continuation of benefits pending appeal; (2) whether Defendants violated the Due Process rights of members of Class 2 when they fail to maintain benefits pending appeal for those who file timely appeals; (3) whether Defendants violate the rights of members of Class 2 when they fail to consider an appeal request as timely, for purposes of continued benefits pending appeal in certain circumstances complained about by Plaintiffs. The Court granted Defendants' second

motion for partial summary judgment, holding that Plaintiffs are limited to prospective injunctive relief on these remaining issues.

The parties believe that it is in the best interest of the State of Indiana and its citizens to resolve the remaining issues presented in this case.

The parties entered into negotiations and as a result, upon final court approval, the parties have voluntarily settled this dispute and entered into this Consent Decree. This Consent Decree shall not constitute an admission or finding on the merits of the case. This Consent Decree resolves all issues in this action, with the exception of attorneys' fees and costs, the resolution of which is discussed in detail in Section VII of this Consent Decree.

In resolution of this action, the parties hereby **AGREE** and the Court expressly **APPROVES**, and **ORDERS** the following:

I. Pre-Conditions

- A. The parties agree that, before the Court can enter final approval of the Consent Decree, reasonable notice to the remaining members of the classes as noted below must be given pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.
- B. The parties also agree that before the Court can enter final approval, this Consent Decree is subject to approval by the Attorney General and the Governor of the State of Indiana. Defendants provided the initial proposed Settlement Agreement to the Attorney General on May 11, 2011.
- C. The parties further agree that this Consent Decree is contingent upon a finding from the Court that the terms are: (i) fair to all parties, and (ii) in compliance with state and federal law.

II. Class Certification

- A. On April 2, 2008, the parties stipulated and agreed that two (2) classes should be certified pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, with the classes defined as follows:
1. All current and future applicants for or recipients of Medicaid with a "spend-down," whose income exceeds program eligibility standards ("Class 1").
 2. All current and future Medicaid recipients who have received or will receive a notice of action to reduce or terminate benefits ("Class 2").
- B. The Court approved the parties' stipulation on April 4, 2008. However, in light of the Court's summary judgment rulings, only Class 2 claims remain.
- C. The parties recognize that, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, final judgment cannot be entered upon a Consent Decree until after appropriate notice is given to the remaining class members and the Court has determined that the terms of the proposed settlement are fair to such class members.

III. Notice to the Class

- A. The specific form of the notice to the remaining class members described in Section II is attached hereto as Attachment A.
- B. The notice will be given in the following fashion:
1. Notice to all class members shall be posted in conspicuous places in all local offices of the Division of Family Resources throughout the State of Indiana and posted electronically on the FSSA Web site. Distribution copies of the notice shall be made available to individuals at their request.

2. Notice shall be published in the largest newspapers of general circulation in Indianapolis, Fort Wayne, South Bend, Evansville, Gary, Lafayette, New Albany and Richmond. Such publication shall occur once per week over three (3) consecutive weeks, beginning no later than ____, 2011.
3. Notice shall be posted electronically to class members who maintain electronic mail accounts on record in the FSSA database.

IV. Fairness Hearing

- A. Plaintiffs' counsel shall report to the Court as to any contact from the remaining class members concerning the Consent Decree. This report shall be filed no later than 10 days prior to the fairness hearing.
- B. The Court will schedule a fairness hearing for a date to be published in the notice to each class. It is the intention of the parties that after said hearing, a Consent Decree will then be approved and that a final judgment be entered thereon.

V. Stipulated Agreement Regarding Class 2

- A. For purposes of the maintenance of benefits ("MoB") deadline & MoB Reporting provisions of this agreement:
 1. Deadline for MoB: The deadline to appeal the termination or reduction of benefits under Medicaid in order to maintain benefits pending an appeal of the agency action is close of business on the day before the effective date of the action. If the day before the effective date is a non-business day, the MoB deadline is close of business on the next FSSA business day.
 2. Agency action: The termination or reduction of Medicaid Benefits.

3. Effective Date: The effective date is the date on which the agency action will occur.
4. Business day: Days FSSA is open for business.
5. Close of business: 4:30 p.m. local time on a business day of where the appeal is filed, or 4:30 pm E.T. on a business day if the appeal is filed at Hearings and Appeals Division of FSSA.

B. Maintenance of benefits. Within one (1) year of settlement, FSSA will:

1. Maintain Medicaid benefits for at least ninety-three percent (93%) of those individuals whose appeal request is received before the close of business on the last business day before the effective date. (Group A).
2. Maintain or reinstate Medicaid benefits no later than the fifth (5th) business day after the deadline for MoB for at least ninety-eight (98%) of those individuals whose appeal request is received before the deadline for MoB. (Group B).

C. MoB Reporting.

1. Within six (6) months of settlement, FSSA shall establish methods, certified by FSSA's OV&V contractor, to insure that its MoB reports reliably include all timely appeal requests and accurately report whether benefits were maintained according to the terms of this agreement.
2. Within (9) nine months of settlement, FSSA shall insure that its MoB reporting system is at least 98% accurate.
3. The methods employed by FSSA and certified by the OV&V contractor, referred in Paragraph C(1) above, shall include:

- i. A critical incident procedure to which Medicaid recipients and their representatives can, and FSSA's supervisory staff and contractors shall, report any failure to properly process a timely appeal request. The critical incident procedure shall include remediation of individual failures and analysis of patterns of errors and omissions for systemic or managerial remediation;
 - ii. Random sampling of termination and reduction actions to determine whether and to what extent appeal requests are not properly identified or processed.
4. FSSA will provide to Plaintiffs on a monthly basis MoB compliance reports and beginning six (6) months following the date of settlement, (May 7, 2011), the certified OV&V methodology and OV&V reports no later than 45 days after the end of the month being measured (or the next business day). For example, the November 30, 2011 report would be reported January 14, 2012. If the 14th were a Sunday, the report would be provided the 15th.

D. Policy Updates - Consistent with other federal or state laws or regulations, and other federal policies, FSSA agrees to the following policies:

1. FSSA shall reinstate and continue services until a decision is rendered after a hearing if (1) action is taken without the advance notice required under 42 C.F.R. § 431.211 or 42 C.F.R. § 431.214; (2) the recipient requests a hearing within 10 days of the mailing of the notice of action; and (3) the agency determines that the action resulted from other than the application Federal or State law or policy. (42 C.F.R. § 431.231(c)).

2. If a Medicaid recipient's whereabouts are unknown, as indicated by the return of unforwardable agency mail directed to the recipient, any discontinued services shall be reinstated if the recipient's whereabouts become known during the time the recipient is eligible for services. (42 C.F.R. § 431.231(d)).

E. Notice Updates - Within six months of the entry of a Consent Decree:

1. FSSA's notices and policy language will conform to the close of business deadlines described within this agreement.
2. FSSA's notices will inform beneficiaries they should expect a short interruption of coverage at the beginning of the next month if their appeal request is not received by FSSA before the close of business on the last business day before the effective date, such as when the appeal request arrives on the last day of the month or the first business day following a last day of the month when the last day falls on a non-business day.
3. FSSA's notices will include statements reflecting the Policy Updates in Section V.D. FSSA's MOB and OV&V compliance reports need not include compliance with the policies in Section V.D (1) & (2). The rights of any person aggrieved by untimely maintenance of benefits in the circumstances described in V.D (1) & (2) shall not be restricted by the terms of this agreement.
4. FSSA's notices will state as follows: "We will continue your benefits without change if we receive your appeal before [INSERT DATE] (the effective date of the action)."

VI. Modification and Enforcement

- A. The parties agree that a party may obtain modification of this Consent Decree upon a showing to the Court that there has been a change in the governing law, whether by statute or regulation, and that the modification is necessary to comply with the change in law. Modifications relating to changed circumstances shall be governed by the standards of Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393, 112 S.Ct. 748, 765, 116 L.Ed.2d 867 (1992), which require, inter alia, that the party seeking modification “establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances.”
- B. In the event that the Plaintiffs believe that the Defendants are not in compliance with any portion of this Consent Decree, Plaintiffs' counsel shall report that belief in detail to the Defendants' counsel in writing. The parties shall attempt, in good faith, to resolve the issue prior to the Plaintiffs petitioning the Court concerning that matter. The Plaintiffs agree not to petition the Court for contempt or enforcement of the Consent Decree for at least thirty (30) days after the Plaintiffs serve the above-described written statement on the Defendants.
- C. In addition, if FSSA maintains, on average, a ninety-three percent (93%) compliance rate for Group A and, on average, a ninety-eight percent (98%) compliance for Group B for a nine (9) month period, with not less than ninety-nine (98%) accuracy according to the OV&V reports, and all pending issues between the parties have been resolved, including payment of attorneys' fees, the matter will be dismissed with prejudice and case will be closed. The parties agree that the dismissal and closure of

this case will release and forever discharge Defendants from the stipulated Class 1 and Class 2 claims. Specifically, the dismissal and closure of this case will release and forever discharge Defendants from the stipulated Class 1 claims that "Defendants' standard notices (used to deny, reduce or terminate benefits due to excess income) violate Due Process, and ... Defendants' rules and interpretations of Defendants' standard for counting incurred medical expenses violate Plaintiffs' rights under Due Process and federal law" and the stipulated Class 2 claim that "Defendants routinely violate the rights of beneficiaries to have benefits continued upon appeal of an adverse action under Due Process and federal law." (*See* Docket No. 144). The dismissal and closure of this case will not operate as a release of claims that could be asserted based on acts or omissions that occur after the May 7, 2011 agreement. The dismissal and closure of this will not operate as a release of claims that could be asserted against Defendants' contractors and sub-contractors.

- D. However, this case will not be dismissed if Defendants materially deviate from the other provisions of this agreement.

VII. Attorneys' Fees and Costs

- A. The parties agree that Plaintiffs shall be treated as prevailing parties in respect to Class 2 and are entitled to recover their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.
- B. Defendants reserve the right to contest the reasonableness of attorneys' fees and costs in respect to Class 2 and the right to contest whether all of Plaintiffs' attorneys' fees and costs are reasonable and recoverable in respect to Class 1.

- C. Within fifteen (15) days of the Court's approval of the terms of this agreement, Plaintiffs' counsel shall submit a detailed proposal concerning fees and costs to Defendants together with documentation.
- D. Defendants shall respond to Plaintiffs' submission within thirty (30) days thereafter.
- E. In the event that no agreement or settlement as to the total amount of attorneys' fees and costs can be reached within sixty (60) days after approval of this agreement, Plaintiffs' counsel may apply to the Court for a determination of the disputed fees and costs and Defendants may file a response thereto.

WHEREFORE, the parties request that this Consent Decree be approved following notice to the class.

For the Plaintiffs:

Scott R. Severns
Lindsay R. Knowles
Anna M. Howard
SEVERNS & STINSON, PC
10293 N. Meridian Street, Suite 150
Indianapolis, IN 46290
(317) 817-0300

For the Defendants:

Ryan Hurley
Harmony Mappes
BAKER & DANIELS
300 N. Meridian Street, Suite 2700
Indianapolis, IN 46204
(317) 237-0300